SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1964
No. 1064

REGINE IRENE CALEF,

Petitioner,

vs.

GEORGE K. ROSENBERG, District Director, and MICHAEL F. LEONE, Special Inquiry Officer of, and UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE AT LOS ANGELES, CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support of Petition.

DAVID C. MARCUS and
GYTE VAN ZYL,
215 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Points Involved.

1. Is the Circuit Court of Appeals of the United States with jurisdiction to dismiss a duly perfected appeal from a District Court judgment denying a writ of habeas corpus when an order of the Board of Immigration Appeals has ordered reopening of the Immigration proceedings for a limited purpose?

2. Is the Circuit Court of Appeals of the United States with jurisdiction to dismiss a duly perfected petition for judicial review after a refusal to accept a petition to reopen the deportation proceedings by the Special Inquiry Officer of said Service, and after the Board of Immigration Appeals on appeal from said order directed reopening for a limited purpose?

3. Is the Circuit Court of Appeals of the United States with jurisdiction to dismiss a duly perfected appeal from a petition for judicial review for the failure of the District Director to accept for filing a petition for stay of deportation and his failure to exercise *any* discretion, where no appeal lies to the Board of Immigration appeals from the failure to act by District Director?

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Petitioner Regine Irene Calef recites:

Jurisdiction.

Jurisdiction is invoked under the provisions of Section 1254(1) of Title 28 United States Code Annotated.

Decisions Below.

On the 4th day of January, 1965, in the matter entitled Regine Irene Calef, Petitioner, v. George K. Rosenberg, District Director, and Michael F. Leone, Special Inquiry Officer, of, and Immigration and Naturalization Service at Los Angeles, California, Respondents, in proceedings numbered 19713, the United States

Court of Appeals for the Ninth Circuit, on motion of the respondents, by its "Order on Motions" dismissed the petition of Calef seeking judicial review under the provisions Section 1105 , Title 8, United States Code Annotated (Section 106a of the Immigration and Nationality Act) to review (1) the failure to act by respondent Special Inquiry Officer on the motion of Calef to the Immigration Service to reopen deportation proceedings and (2) the failure to act by respondent District Director on Calef's petition for stay of deportation, under the provisions of Section 243.4, Title 8, of the Code of Federal Regulations, directed to respondent District Director. By said order the motion of Calef for an order consenting to the reopening of her deportation proceedings was granted.

On the 4th day of January, 1965, the United States Court of Appeals for the Ninth Circuit, in the matter entitled Regine Irene Calef v. George K. Rosenberg, District Director of United States Immigration and Naturalization Service at Los Angeles, California, in proceedings numbered 19610, dismissed a direct appeal, on motion by respondent, from a judgment of the United States District Court for the Southern District, Central Division, at Los Angeles, California, denying Calef's petition for writ of habeas corpus relating to the actions of the Immigration Service and its District Director at Los Angeles in denying petitioner's rights under the Immigration Nationality Act.

Statement of the Record.

Petitioner Calef filed her petition to reopen deportation proceedings with the Immigration and Naturalization Service at Los Angeles, California, pursuant to Section 242.22 of Title 8 of the Code of Federal Regulations, and also a petition to stay deportation pursuant to Section 243.4 of Title 8 of the Code of Federal Regulations, and subsequently amended the same by her verified supplement thereto. The Special Inquiry Officer of said Service refused to accept or consider, and returned to the petitioner the original formal petitions to reopen filed by petitioner. The District Director of said Service failed and refused to act upon said petitions for stay of deportation, failed to render his decision as required by 8 C.F.R. Sec. 243.4, and failed to give notice as required by said section. By letter dated November 19, 1964, the Special Inquiry Officer stated:

> "In view of the pendency of judicial proceedings, to wit: respondent's appeal before the United States Court of Appeals for the Ninth Circuit, from denial by the United States District Court, on October 7, 1964, of respondent's petition for a Writ of Habeas Corpus, possibly affecting the validity of the decision and orders heretofore entered in subject's deportation proceedings, I am without authority to act upon subject's 'Petition' to Reopen her deportation proceedings.
>
> Accordingly, the said petition, dated November 4, 1964, together with the supplement thereto, dated

November 16, 1964, and undated Motion to Reopen and to Reconsider, submitted on respondent's behalf by Associated Counsel, Lloyd A. Tasoff, are herewith returned to you."

Petitioner thereupon filed notice of appeal to the Board of Immigration Appeals of the Department of Justice, attaching a copy of each of the documents so returned to Petitioner together with a copy of said letter, and simultaneously filed a petition for judicial review with the Circuit in the aforementioned proceedings No. 19713.

The Board of Immigration Appeals did on the 4th day of December, 1964, remand for further proceedings on the merits, subject to the Circuit's consenting to further administrative proceedings. A copy of the Board of Immigration Appeals' order is attached hereto as Exhibit "A". Upon motion by Calef to the Circuit, pursuant to the directive of the Board of Immigration Appeals, for an order consenting to further administrative proceedings, the Circuit granted petitioner's motion, but, on motion of the respondent, ordered dismissal of the pending petition for judicial review, as noted above.

Petitioner's appeal from the denial of her petition for a writ of habeas corpus was pending before the Circuit at the time the Board of Immigration Appeals made its order above referred to, as is shown by said order, and it was that appeal which was dismissed by the Circuit in its proceeding No. 19610.

Both of the foregoing motions by respondent to dismiss were objected to and opposed by petitioner.

Petitioner's Contentions.

1. The order of dismissal in each of the respective matters by the Circuit denied, and will deny, petitioner due process and equal protection of the laws, for the Circuit having dismissed the petition for judicial review and having dismissed her appeal from the denial of a writ of habeas corpus, has prevented petitioner from appellate review of the failure of the respondent District Director to act upon the merits of petitioner's petitions to the extent that they were addressed to the discretion vested in the Attorney General by law and delegated to the District Director by regulation, and has rendered the grounds for her appeal and the grounds of her petition for judicial review *res judicata,* without benefit of a hearing on the merits thereof. Further, such dismissals placed the District Director in a position to effect deportation of petitioner which he was theretofore barred from doing by the provisions of Section 1105a of Title 8 of the United States Code (Section 106a of the Immigration and Nationality Act). Such dismissals rendered *res judicata* and final all issues, controversies and matters embraced within the appeal from the District Court denying the petition for writ of habeas corpus and all issues, controversies and matters raised by said petition for judicial review with respect to the actions of the Immigration Service, except those matters embraced within the petitions annexed to the notice of appeal upon which the Board acted and rendered its Order dated December 4, 1964.

2. The dismissals by the Circuit have denied petitioner the fair administration of justice and the right to be heard by said Circuit on the issues, matters and controversies presented by the respective petitioners.

3. Petitioner's appeal from the judgment of the District Court and her petition for judicial review to the Circuit in the above entitled matters were perfected and duly pending before said Circuit, awaiting the filing of briefs on the merits which were not yet due, and were not dismissed for any other reason or cause except as herein specified. The right of appeal in habeas corpus proceedings is guaranteed and provided for under Section 2253 of Title 28 of United States Code Annotated and petitioner's right to file a petition for judicial review is provided for under Section 1105a of Title 8 of United States Code Annotated (Section 106a of the Immigration and Nationality Act).

4. The failure of the District Director to act on the petition of Calef for a stay of deportation under the provisions of Section 243.4 of Title 8 of the Code of Federal Regulations was not an act or omission which was subject to review by the Board of Immigration Appeals, but only by the Court, and the effect of the dismissals was to render Petitioner without a remedy with respect to such acts and omissions. The failure to act by the District Director, and the dismissal of the petition for judicial review by the Circuit, constituted a denial of due process of law as to petitioner herein and deprived her of rights and remedies accorded to her by statute and regulation.

Question Presented.

Did the granting of petitioner's motion for an order consenting to the reopening of her deportation proceedings, pursuant to the order of the Board of Immigration Appeals, render moot the petition for judicial review filed by petitioner in proceeding No. 19713, and her appeal from the judgment denying her writ of habeas corpus in proceeding No. 19610?

Argument Relied on for Issuance of the Writ.

A review of the record before the Circuit will disclose that the only ground upon which the motion to dismiss both the petition for judicial review and the appeal from the denial of the writ of habeas corpus was based was that the consenting of the Circuit to the order of the Board of Immigration Appeals reopening the proceedings rendered both of these matters moot.

The petition for judicial review to the Circuit discloses that a portion thereof is addressed to the failure of the District Director to consider, or exercise any discretion as to, the application of petitioner for a stay of deportation. Such failure and refusal to act and or exercise discretion constituted clear error of law and denial of due process.

Section 243.4 of Title 8 of the Code of Federal Regulations provides, as follows:

> "§243.4 Stay of deportation.
>
> Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to section 243(h) of the Act, shall be filed on Form 1-246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at

> the time and place designated for his deportation. Denial by the district director of a request for a stay is not appealable but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in Part 3 of this chapter."

Since under said section 243.4 there is no appeal from the District Director's decision, the Board of Immigration Appeals has no power to review the discretion vested by said section in the District Director, and its order reopening the deportation proceedings and the order of the Circuit consenting to the reopening of such deportation proceedings, did not affect petitioner's rights to have a judicial review of the refusal of the District Director to consider, act upon or exercise discretion as to the petition for stay of deportation.

The Court has a duty to intervene where there has been a failure to act or exercise discretion. Section 1009(e) of 5 U.S.C.A. defines the scope of judicial review of agency action in part, as follows:

> "It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . . or . . ."

Section 1009(e) of 5 U.S.C.A. is applicable to discretionary functions vested in the Attorney General under the Immigration and Nationality Act.

Lam Tat Sin v. Esperdy, 227 F.Supp. 482, 486 (affirmed 334 F. 2d 999) (2nd Cir. 1964).

Where discretion is vested in the Attorney General, he must exercise it. He cannot refuse to act, refuse to consider the application and refuse to exercise his discretion. Where he does refuse or neglect to act, the court should order him to exercise his discretion.

Pagano v. Brownell, 227 F. 2d 36, 97 U.S. App. D.C. 21 (1955);

Miyagi v. Brownell, 227 F. 2d 33, 97 U.S. App. D.C. 18 (1955).

Since 8 C.F.R., Section 243.4 provides that "written notice of the disposition of the alien's request (for a stay of deportation) *shall be* served upon him . . .", by necessary implication this regulation requires the District Director to act upon the petition. His failure to do so constitutes a violation of Petitioner's vested rights.

Rules and regulations promulgated by governmental agencies pursuant to statutory authority have the force and effect of law.

Atwoods Transport Lines, Inc., v. U. S., 211 F.Supp. 168, 170, affirmed 373 U.S. 377, 833 S. Ct. 1312, 10 L.Ed. 2d 420.

Petitioner's appeal to Circuit from the denial from the District Court of her petition for a Writ of Habeas Corpus raises several issues which the dismissal by the Circuit of such appeal renders moot as *res judicata* and the petitioner will be precluded from raising those

issues hereafter, except those issues embraced within the petitions annexed to the notice of appeal to the Board of Immigration Appeals upon which the Board acted and rendered its order dated December 4, 1964.

It is significant that the Board's order to reopen was conditional upon the consent of the court, not the dismissal of the court proceedings.

Petitioner's right of appeal was predicated on Section 2253 of Title 28 of United States Code Annotated, and there is no authority therein contained for a dismissal thereof in denial of her right to a hearing on the merits of such appeal upon the grounds set forth in respondent's motion in light of the allegations contained in the petition for writ.

Petitioner's right to judicial review and the acts, and failure to act, of the respondent District Director and respondent Special Inquiry Officer are predicated upon Section 1105a of Title 8 United States Code Annotated (Section 106a of the Immigration and Nationality Act), and the dismissal of her entire petition as to all matters therein alleged, merely on the basis of a reopening of the deportation proceedings, constituted a denial of due process of law, a denial of the right of judicial review afforded to petitioner by statute, and by necessary effect, a denial of petitioner's right to the benefit of a fair exercise of the discretion vested by statute and by regulation in the respondent District Director.

Wherefore, petitioner respectfully prays that a writ of *certiorari* issue out of this Court to review the decisions of the United States Court of Appeals for the Ninth Circuit rendered on January 4, 1965, that said Circuit

Court be ordered to vacate its orders of dismissal in both of the respective matters herein referred to, and that a determination of the appeal herein referred to and the petition for judicial review herein referred to, be held in abeyance pending the reopening of petitioner's deportation proceedings, the making of a decision therein by the Special Inquiry Officer, and the review thereof by the Board of Immigration Appeals.

Respectfully submitted,

DAVID C. MARCUS and
GYTE VAN ZYL,
By DAVID C. MARCUS,
Attorneys for Petitioner.

EXHIBIT A.

United States Department of Justice, Board of Immigration Appeals.

File: A-11567410—Los Angeles Dec. 4, 1964

In re: Regine Irene Calef

In Deportation Proceedings

Appeal

On Behalf of Respondent: David Carliner, Esq. Wasserman and Carliner Warner Building, Washington 4, D.C. and David C. Marcus, Esq., 215 West Fifth Street, Los Angeles, California 90013.

On Behalf of I&N Service: William S. Howell, Trial Attorney (Brief filed)

Charges: Order: Sec. 241(a)(2), I&N Act (8 USC 1251(a)(2)) — Nonimmigrant — remained longer
Lodged: None

Application: Motion to reopen

The case comes forward on appeal from the order of the special inquiry officer dated November 19, 1964 denying the motion to reopen on the ground that the special inquiry officer is without jurisdiction because of the pendency of judicial proceedings.

The record relates to a native of Egypt and a citizen of Italy through marriage, 47 years old, female, who last entered the United States at the port of New York on or about October 24, 1958 and was admitted as a nonimmigrant visitor for pleasure authorized to remain in the United States until September 30, 1959. The respondent has remained longer than authorized. Deportability is not contested.

After a hearing in deportation proceedings the special inquiry officer on May 8, 1962 granted the respondent the privilege of voluntary departure with the further order that if she failed to depart when and as required, the voluntary departure privilege be withdrawn and the respondent be deported to Italy on the charge contained in the Order to Show Cause. Thereafter the respondent filed a motion to reopen the deportation proceedings on the ground of changed circumstances inasmuch as on August 19, 1964 a decree of divorce was granted respondent's husband in the State of Alabama which decree is final, and the respondent wishes to reopen the deportation proceedings to withdraw her designation of Italy as the country to which she desires to be deported on the ground that she never resided in Italy and her Italian citizenship, due to the divorce, is open to question. Upon the failure of the respondent to depart voluntarily, a warrant of deportation was issued by the District Director on July 6, 1964. A petition for a writ of habeas corpus on behalf of the respondent was filed on July 9, 1964. This petition was denied on October 7, 1964 and a motion for rehearing was denied October 16, 1964. The matter was then appealed on October 21, 1964 to the Ninth Circuit Court of Appeals and is still pending. The District Director, Los Angeles District, under date of November 23, 1964 advised that counsel had filed what purports to be a petition for judicial review under Section 106 of the Immigration and Nationality Act with the Court of Appeals for the Ninth Circuit.

Despite the fact that the case is under judicial consideration, the motion to reopen can be entertained if the court consents to a request from counsel. In view of the

changed circumstances set forth in the motion to reopen, we shall remand the case to the special inquiry officer for reopening and a decision on the merits, subject to the consent of the court. The decision should be certified to this Board for review. In the light of this disposition of the case, the request for oral argument will be denied.

Order: It is ordered that the request for oral argument on the motion be and the same is hereby denied.

It is Further Ordered that the case be remanded for further proceedings on the merits subject to the court consenting to further administrative proceedings.

Chairman